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In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
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No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS,

v.

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION HARVARD UNIVERSITY, AND THE UNITED MINISTRIES IN PUBLIC EDUCATION, IN SUPPORT OF THE PETITIONERS

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Introduction — Interest of the Amici

We present this brief, supporting the petitioners, with the consent of all parties pursuant to Supreme Court Rule 42(2). Copies of the three letters of consent are attached to our covering letter to the Clerk of this Court.

The *Amici* are the Center for Law and Education, Harvard University, and the United Ministries in Public Education. The Center was formed in 1969. Sponsored by the Harvard Law School and the Harvard Graduate School of Education, the Center is funded by the United States Office of Economic Opportunity to work with local legal service offices and other attorneys on behalf of the poor, to promote reform in education. Center attorneys have worked on problems in the following areas: school fees (about which we have received numerous inquiries); student rights; resource allocation, within and between school district; "ability grouping" practices; racial discrimination; and federal programs, particularly Title I of the Elementary and Secondary Education Act of 1965. The Center publishes a bulletin, *Inequality in Education.*

Center personnel have participated in significant litigation; done research and writing; drafted legislation; and negotiated with public officials. The court of appeals entered orders in this case accepting a brief and a reply brief, *amicus curiae,* filed by the Center. The court's opinion referred to these briefs.[1] In this Court, the *Amici* filed a brief in support of the petition in November, 1971. This Court accepted an *amicus curiae* brief prepared by Center attorneys in the cases involving aid to parochial schools during the October, 1970 Term. See *Lemon* v. *Kurtzman,* 401 U.S. 931.

The Center's affiliation with the Harvard Graduate School of Education facilitates our presenting to courts educational data which is material under governing legal principles. In this brief, we present such data bearing upon the "interests of those who are disadvantaged by the [challenged] classification." *Kramer* v. *Union Free School*

[1] "In addition to the briefs of the parties, this court has the advantage of a well-prepared brief and reply brief submitted by the Center for Law and Education of Harvard University." (App. at 63.)

District, 395 U.S. 621, 626, quoting *Williams* v. *Rhodes,* 393 U.S. 23, 30 (explanation added).

The United Ministries in Public Education (UMPE) was created by a group of agencies of the Episcopal Church, Presbyterian Church of the United States, the United Church of Christ, and the United Presbyterian Church, U.S.A., to serve as a joint agency of these religious communions. Its purpose is to assert that the Church is a vital force in our society and as such must accept its accountability for education. The UMPE supports the public educational system where it is contributing to the humane development of persons and calls for reevaluation of the system where needed. The UMPE works in coalition with others for the reform of educational policy and practice where necessary.

The UMPE's goals cover a wide spectrum of concerns for equalized educational opportunity. The UMPE supports litigation seeking to equalize educational opportunity by challenging special tax measures and tax allocation formulas for public education which perpetuate inequality of opportunity.

Statement

Procedural History

Parents of elementary school students in Union Free School District No. 27, Town of Hempstead, New York, began this class action on September 16, 1970, challenging the denial of textbooks to their children as violative of the equal protection clause of the Fourteenth Amendment.[2] Plaintiffs presented three claims, focusing on the denial of texts to their children because of plaintiffs' inability

[2] The defendants are the superintendent and school board of District 27, the New York State Education Department and the Department's commissioner. (App. at 10.)

to pay the rental fee (Claim III), and the differences in the procedures for providing texts for students in grades 7-12 and 1-6 under Sections 701 and 703, respectively, of New York's Education Law (Claims II and III). (App. at 10-12.)

Plaintiffs prayed, in part for:

— an order "enjoining the defendants ... from enforcing or implementing New York Education Law Sec. 701 insofar as it denies free textbooks to those pupils in first through sixth grades, while requiring free textbooks for pupils in grades seven to twelve...."
— a "declaratory judgment declaring New York Education Law Sec. 701, *et seq.* unconstitutional ...."
— and "such additional or alternative relief as the Court may deem to be just and appropriate." (App. at 13-14.)

The district court dismissed the complaint for failure to state a claim, without holding an evidentiary hearing or requesting that a three-judge court be convened. See 319 F. Supp. 271. The court of appeals affirmed, Judge Kaufman dissenting. See 449 F. 2d 871.

On February 22, 1972, this Court granted plaintiffs' petition for a writ of certiorari. See 92 S. Ct. 986. Plaintiffs' petition raised only the third or poverty claim, presenting two questions:

(1) May New York State constitutionally deny indigent children textbooks essential for required instruction solely because of their inability to pay rental fees?
(2) Have petitioners raised a substantial constitutional claim requiring that a three-judge court be convened?

Facts

The answer of the defendant local school officials, the superintendent and school board of District 27, forthrightly admits that the denial of textbooks to poor children in grades 1 to 6 creates two classes of students in those grades, and contravenes the equal protection clause of the Fourteenth Amendment.

> 12. Admit that the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks. (App. at 35.)

This admission is fully supported by the other facts of record, briefly summarized as follows:

1. New York's compulsory attendance law requires children between the ages of 6 and 16 to attend school. N.Y. Education Law, Sec. 3205(1)(a).

2. In 1970-71 (and again in 1971-72 as shown by the Petition), the system required payment of a $7.50 rental fee for textbooks for all students in grades 1 to 6, regardless of the economic status of their families. (Admitted; App. at 7, 34.)[3]

---

[3] The overall textbook distribution scheme, as of the filing of the action, was as follows: (1) Section 701 of the New York Education Law required districts to lend textbooks free to all students in grades 7-12 attending public and private schools, and provided for a state grant to cover the cost. (2) Section 703 of the New York Education Law required districts to lend textbooks free to students in grades 1-6, *if the voters approved a tax for these books.* (3) When, as in this school district in 1970-71 and 1971-72, the voters did not approve this tax for texts for grades 1 to 6 and other purposes, the district could still levy a tax for "teachers' salaries" and "ordinary contingent expenses." New York Education Law, Sec. 2023. (4) Opinion Number 213 of the Counsel to the Education Department, July 6, 1967, did not include expenditures for texts for grades 1-6 as

3. The named plaintiffs had a total of five children enrolled in grades 1-3 in the system. (App. at 22, 24, 26.)

4. The complaint alleged that "[p]laintiffs, recipients of public assistance, are indigent and cannot pay [the] fee." (App. at 4, 8-9.) While the local defendants generally denied this allegation (App. at 34), the named plaintiffs made uncontroverted affidavits, filed in the district court, that they were unable to pay the fee. (App. at 22, 24, 27.)[4]

5. "Children who did not bring the fees demanded were denied textbooks ...." (Admitted; App. at 7, 34.)

6. The complaint alleges that the operative effect of the fee requirement is to create two classes of students in grades 1-6. "[Plaintiffs'] children are ... being denied essential textbooks,[5] which are nonetheless available to other similarly situated but more wealthy children, and hence receive a significantly inferior education solely because of plaintiffs' indigency." (App. at 4.) The allegation of an

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being in the category of "ordinary contingent expenses." (5) The district provided texts free to grades 7-12, but charged a fee for grades 1-6. (See App. at 59-60.)

On June 22, 1971, the legislature added the following sentence to Section 703. "Notwithstanding the provisions of subdivision one of this section, where the qualified voters have failed, neglected or refused to authorize free distribution of textbooks, the board of education or trustees of the district may, within its discretion, purchase textbooks and either rent or sell the same to pupils in grades one through six, inclusive, attending the schools in such district." N.Y. Laws of 1971, Ch. 699.

[4] As set forth in the complaint, in addition to the textbook fee, the system charged fees, varying in amount based upon grade level, for workbooks, duplicating paper and other supplies and materials. (App. at 7, 83.) Under this schedule, the named plaintiffs were assessed the following amounts. Daisy Johnson (4 children) — $58.50; Dorothy Miller (1 child) — $6.00; and Forestine Pressy (1 child) — $17.50. (App. at 9, 83.) Also, plaintiffs made affidavits that they lived more than a mile from the schools to which their children were assigned and that the system informed them that it would no longer provide free bus transportation. (App. at 22, 24, 26.)

[5] In his dissenting opinion in *Board of Education* v. *Allen*, 392 U.S. 236, 252, Mr. Justice Black stated: "Books are the most essential tool of education, since they contain the resources of knowledge which the educational process is designed to exploit."

"inferior education" is established by the record. In addition to the admission by the local defendants in paragraph 12 of the answer quoted above, their papers filed in the courts below and this Court contain the following statements:

> We believe ... that textbooks for all pupils are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters.
>
> Affidavit of School Board President Donald J. Siskind, September 23, 1970. (App. at 40.)
>
> The denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks.
>
> Affidavit of Superintendent Edward Moyer, September 25, 1970. (App. at 41.)
>
> The defendant Board of Education believes that textbooks for all pupils are essential to a quality educational program and a necessary tool in the education of youngsters.
>
> Brief of local defendants in Court of Appeals at 3.
>
> The defendant Board of Education believes that textbooks for all pupils are essential to a quality educational program and a necessary tool in the education of youngsters.
>
> Brief in Opposition of local defendants in this Court at 3.

In the district court, the plaintiffs presented the affidavit of Dr. Gerald G. Glass, Professor of Education and Director of the Reading and Study Center and Graduate Pro-

gram in Reading at Adelphi University. It reads, in part, as follows:

> No educational program can exist without books. It is professionally unthinkable to assume that an educational program of even the meagerest scope would not minimally include books. Books of all kinds, readers, workbooks, trade books, reference books, et al. The process of education, as conceived in this country, assumes that persons must 'learn' not only from their own relatively narrow, actual experiences, but also from the extensive dimension that can only be offered through books. (App. at 31-32.)
>
> In fact, in my opinion a good case could be made for the grade school as having more pertinent requirements for textbooks. Because the early school years are the formative school years a wealth of material needs to be applied to offer the youngsters reinforcement for learning. It is not uncommon that a textbook in the primary grades serves as the major structure for the whole curriculum in any one subject. (App. at 33.)

7. The complaint alleged, in part, (App. at 13):

> (XII) (b) Indigent children sitting, bookless, side by side in the same classroom with other more wealthy children learning with purchased textbooks engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their well being.

While affirming the district court's dismissal of the action, the court of appeals majority described this allegation as

"quite [realistic]," a position with which Judge Kaufman dissenting agreed. (App. at 62, 79.)

Plaintiffs' affidavits portray clearly the tragic impact of the denial of texts:

> On the first day of school my daughter asked her teacher for textbooks and was told that she would have to bring money from her mother to obtain textbooks. My daughter asked me upon her return from school why some children in her class were given books, and I told her, that the parents of those children were able to pay for the textbooks.
>
> Affidavit of Plaintiff Forestine Pressy. (App. at 26.)
>
> ... (a) Herron Johnson, age 8, attends the third grade. Each day he is told that he will receive an 'F' for the day because he is without the required textbooks. When the other pupils in the class read from textbooks, the teacher doesn't let him share a book with another pupil, instead she gives him paper and tells him to draw.
>
> Affidavit of Plaintiffs' counsel Carl Nathanson. (App. at 28.)

8. In summary, this case involves a shocking situation: poor children are required to attend school without an "essential" educational tool, for reasons wholly beyond their own control; as a direct consequence, they are denied an educational opportunity equal to children from more affluent families, and stigmatized; and all this occurs in a nation whose constitution guarantees the equal protection of the laws and whose President proclaims:

> Economic, educational, social mobility—all these too, are essential elements of the open society. When we

> speak of equal opportunity we mean just that; that each person should have *an equal chance at the starting line,* and an equal chance to go just as high and as far as his talents and energies will take him.
>
> Statement by the President [Nixon] on Elementary and Secondary School Desegregation, March 24, 1970, at 17. (Emphasis added.)

Summary of Argument

1. The textbook fee operates to create two classes of students in grades 1-6. Students whose parents can pay the rental fee receive essential texts and can participate fully in the educational program. Other students, denied texts *because of their parents' poverty,* are admittedly deprived of an equal educational opportunity. Moreover, poor children suffer this fate in the schools which New York requires them to attend.

During the past 17 years, in a series of approximately 19 cases, this Court has held a variety of fee and payment requirements, with a similar wealth-impact, violative of the Fourteenth Amendment. These cases, in which the Court scrutinized carefully the particular interest burdened, involved the criminal process (*e.g., Griffin* v. *Illinois,* 351 U.S. 12), voting (*Harper* v. *Virginia State Board of Elections,* 383 U.S. 663) and divorce litigation (*Boddie* v. *Connecticut,* 401 U.S. 371.)

The pronouncements of this and other courts, and our Presidents, the objective treatment of education by Congress and the states, and the importance of education to the individual and society—demonstrate that its significance parallels that of the interests involved in the previous wealth-impact cases. We show, herein, that the principles employed in those cases require a holding that defendants' conduct violates the Fourteenth Amendment. Our conten-

tion is buttressed by the stigmatization which must necessarily occur when children of poor families are required to sit bookless in the classroom. See *Wisconsin* v. *Constantineau*, 401 U.S. 433. (See discussion at 16-24.)

2. Defendants' conduct is "not rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U.S. 471, 487. All children, rich and poor, arrive at the schoolhouse door similarly situated in terms of their own conduct. Further, it is the students', not the parents' constitutional rights which are at issue (*Tinker* v. *Des Moines Ind. Com. Sch. Dist.*, 393 U.S. 503, 511); and New York's compulsory attendance law expresses the legislature's determination, where education is concerned, not to rely upon parental action. Given these factors, treating children, otherwise similarly situated, differently because of their *parents'* poverty is not "rationality," but an "arbitrary . . . choice." *Reed* v. *Reed*, 404 U.S. 71, 76-77.

Moreover, denying children books is unrelated to the local system's objective of raising funds; their parents are too poor to pay. And, the denial of books is affirmatively destructive of the goal of educating all children manifested by Article XI, Section 1 of New York's Constitution and the compulsory attendance law, Section 3205 (1) (a). "[T]he State spites its own articulated goals ...." *Stanley* v. *Illinois*, 40 U.S. Law Wk. 4371, 4373.

The "invidious discrimination" is clear. Poor children will be stigmatized. The personal right of a child is burdened because of his parents' poverty, wholly beyond his control. See *Levy* v. *Louisiana*, 391 U.S. 68, 72. The fee has a wealth-impact. Finally, it is material that New York law demonstrates that there are less onerous alternatives. *Carrington* v. *Rash*, 380 U.S. 89, 95-96. (See discussion at 24-29.)

3. The material facts are indistinguishable from those in *Griffin* v. *Illinois*, 351 U.S. 12, *Douglas* v. *California*, 372 U.S. 353 and their progeny. In each situation: (1) the individual's predicament arises from state coercion (prosecution and the compulsory attendance law); (2) something unavailable to the poor is an essential tool for enjoyment of a right; and (3) the tool is fully available to persons who can pay the fee in advance. We show that this case is not distinguishable because it involves education rather than the criminal process. (See discussion at 29-38.)

4. Defendants' conduct violates the Fourteenth Amendment, even if consideration is given to the asserted bases for distinguishing, in the statutory scheme, grades 1-6 and 7-12. First, there are "less drastic" alternatives (*Dunn* v. *Blumstein*, 40 U.S. Law Wk. 4269, 4276) for satisfying state interests. Second, analysis of the legislation reveals a scatter-shot approach, insufficiently tailored to achieving the purported interests to justify the denial of an essential educational tool to the poor. *Kramer* v. *Union Free School District*, 395 U.S. 621, 633. Third, both in terms of the purported state objectives, and independently, those disadvantaged by the classification have, at a minimum, "a stake equal to that of other [pupils]." *Evans* v. *Cornman*, 398 U.S. 419, 426; *Phoenix* v. *Kolodziejski*, 399 U.S. 209-212. Fourth, the court below approved a scheme whereby resources are conserved by "invidious distinctions between classes of citizens." *Graham* v. *Richardson*, 403 U.S. 365, 374-375. (See discussion at 38-49.)

5. We show also that the classification does not satisfy the standard of *Dandridge* v. *Williams*, 397 U.S. 471, 487, even if the asserted bases for distinguishing grades 1-6 and 7-12 are considered, and that defendants deny due process

of law by arbitrarily infringing the interest of poor children in an education [*Meyer* v. *Nebraska,* 262 U.S. 390; *Williams* v. *Illinois,* 399 U.S. 235, 259-266 (concurring opinion of Harlan, J.)], and stigmatizing them. *Wisconsin* v. *Constantineau,* 400 U.S. 433. (See discussion at 49-53.)

6. Plaintiffs sought *only declaratory relief* on their third or poverty claim, the only claim which they argue in this Court. This claim for declaratory relief does not require the convening of a three-judge court. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144; see also *Rockefeller* v. *Catholic Medical Center,* 397 U.S. 820, vacating per curiam, 305 F. Supp. 1256, 305 F. Supp. 1268 (E.D. N.Y., 1969). The dismissal of the poverty claim, without any evidentiary hearing, was erroneous. *Conley* v. *Gibson,* 355 U.S. 41, 45-46. Moreover, the record is adequate, and this Court's authority broad enough (*Boddie* v. *Connecticut,* 401 U.S. 371), for the Court to declare that children whose parents are unable to pay the rental fee have a right to free books. In addition, the district court should be required to identify, expeditiously, the class of students entitled to free texts. (See discussion at 13-16, 53-55.)

Argument

I. The Procedural Posture.

The procedural posture of this case delineates both the issue in this Court and the scope of this Court's remedial authority. There are three pertinent factors: the failure to convene a three-judge court; *the dismissal without an evidentiary hearing;* and the fact that plaintiffs sought only declaratory relief with respect to the substantive claim which they press in this Court.

Plaintiffs' complaint presented three claims. They chal-

lenged: (1) the differences in the circumstances in which texts are provided free to grades 7-12 and 1-6 under Sections 701 and 703, respectively (Claim I); (2) the application of the procedural burden of voter approval only to grades 1-6 under Section 703 (Claim II); and (3) the denial of books to children because of their parents' poverty (Claim III). (App. at 10-12.) Plaintiffs sought injunctive relief as to Claim I and apparently Claim II. (App. at 13.) As to the third or poverty claim, however, plaintiffs sought only declaratory relief.[6]

The lower courts held all three claims insubstantial. In this Court, plaintiffs advance only the third, or poverty claim on which they sought declaratory relief. Thus, plaintiffs do not challenge the insubstantiality findings on Claims I and II, and argue a claim for declaratory relief which would not require the convening of a three-judge court. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 152-155; see also *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (per curiam);[7] *Mitchell* v. *Donovan*, 398 U.S. 427; *Perez*

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[6] App. at 13; compare numbered paragraphs 2 and 3 of the prayer for relief. See also App. at 3, 15, 17 and 21. In one isolated instance, plaintiffs did refer to an injunction against the operation of "Sec. 701, *et seq.* . . ." (App. at 5.)

[7] In *Catholic Medical Center*, plaintiff-hospitals challenged in a class action, on federal statutory and constitutional grounds, a New York law freezing the rate of state reimbursement for Medicaid services irrespective of the actual reasonable cost to the hospitals. The hospitals sought injunctive and declaratory relief apparently involving millions of dollars. Viewing the statute as inconsistent with federal law, the three-judge court nevertheless granted only declaratory relief, in part because the "state ha[d] shown a desire to comply . . . ." See *Catholic Med. Center* v. *Rockefeller*, 305 F. Supp. 1256; 305 F. Supp. 1268 (E.D.N.Y. 1969). In dismissing the state's appeal of the declaratory relief, this court held that it did not have jurisdiction on direct appeal because the "judgment appealed does not include an order granting or denying an interlocutory or permanent injunction . . . ." See 397 U.S. 820.

We note that in *Catholic Medical Center* this Court construed 28 U.S.C. 1253, whereas our argument concerns the meaning of 28 U.S.C. 2281. However, in each instance the critical factor is the meaning of

Ledesma, 401 U.S. 82, 128-129 at n.18 (concurring opinon). Accordingly, in reviewing the dismissal of the complaint, this Court's remedial authority is considerably roader than if the issue were limited to the correctness f the failure to convene a three-judge court. Compare *chneider* v. *Rusk*, 372 U.S. 224 (per curiam) with *Boddie* *Connecticut*, 401 U.S. 371.[8] We discuss our views on ie appropriate relief in greater detail in the Conclusion. Although plaintiffs' poverty claim does not require the onvening of a three-judge court, the dismissal was eroneous unless it appears "beyond doubt that the plainff[s] can prove no set of facts in support of [their] claim hich would entitle them to relief." *Conley* v. *Gibson*, 355 .S. 41, 45-46; 2A Moore's Federal Practice, Sec. 12.08, at 271-74 (2d ed., 1968), quoted in *Williams* v. *Page*, No. 3536 (C.A. 7, June 9, 1971) (unreported), *cert. denied*, 404 .S. 1005, *reversing*, 309 F. Supp. 814 (N.D. Ill., 1970). iven this standard, we maintain that in view of the pertient substantive case law, the admissions of the local deendants and the allegations of plaintiffs' complaint and ffidavits which must, on motion to dismiss, be accepted as

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e words "an interlocutory or permanent injunction." Further, the ourt's construction of the same words in 28 U.S.C. 2282 in *Menza-Martinez* supports our position.

[8] In *Schneider*, the court of appeals affirmed the district court's nclusion that the complaint presented no substantial constitutional sue, and the consequent refusal to convene a three-judge court. This ourt reversed, finding the constitutional question "not plainly inbstantial" in view of "intervening decisions," the opinion also notg, in part: "No view is here intimated as to the merits of the conitutional question . . . ." 372 U.S. at 225. In *Boddie*, the three-judge urt dismissed, without an evidentiary hearing, plaintiffs' Fourenth Amendment challenge to the filing fee requirement for comencing divorce litigation, as applied to indigent persons. See 286 Supp. at 972. (D. Conn., 1969). On appeal, this Court found e factual record adequate, and, implicitly, its authority broad enough hold the fee requirement, as applied to poor persons, violative of the ue process clause.

true,[9] the lower courts erred in dismissing the complaint.[10]

II. The Defendants Have Denied Children From Poor Families The Equal Protection Of The Laws In Violation Of The Fourteenth Amendment.

A. *Introduction: The Fee And Payment Cases And The Importance Of Educational Opportunity.*

1. *The fee and payment cases.*

The local defendants admit that the *impact* of their fee requirement is to deny to poor children an educational opportunity equal to children from more affluent families. We note, therefore, at the outset, that this Court has in five cases held "fees" having a similar, discriminatory *impact*, based upon wealth, violative of the Fourteenth Amendment. See *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708; *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663; *Boddie* v. *Connecticut*, 401 U.S. 371; *Bullock* v. *Carter*, 92 S. Ct. 849.

Burns and *Smith* involved, respectively, $20 and $4 fees to invoke appellate jurisdiction to review a criminal conviction and the denial of a habeas corpus petition. In each case, the fee operated to prevent an indigent defendant from using the remedy fully available to more affluent per-

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[9] *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 172; *Cooper* v. *Pate*, 378 U.S. 546.

[10] Finally, the court below suggested that it might be necessary for plaintiffs to amend the complaint "to attack the constitutionality of the voters' action." (App. at 71, n.8.) However, plaintiffs did allege the voters' action and challenge the statutory scheme as denying Fourteenth Amendment rights to indigent students. (App. at 7, 12.) This surely was adequate. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 46.

ons.[11] In *Harper,* the Court held that Virginia's $1.50 oll tax contravened the Fourteenth Amendment. During he 1971 Term, in *Bullock,* the Court ruled that certain 'exas filing fee requirements for primary elections were iolative of the equal protection clause. The Court noted hat the filing fee had a "real and appreciable *impact*" on oting, stressing that "this *impact* [was] related to the esources of voters supporting a particular candidate...." 2 S. Ct. at 856; emphasis added. Finally, in *Boddie,* the 'ourt ruled that as applied to indigent persons Connec-icut's fee requirement for commencing divorce litigation enied due process of law.

Furthermore, in a number of cases, the Court has found 'ourteenth Amendment violations where some other pay-ient requirement operated to deny to the poor the benefit f a right fully available to more affluent persons. These ases began with *Griffin* v. *Illinois,* 351 U.S. 12 (1956) in 'hich adequate appellate review was unavailable to in-igent defendants because they could not afford a tran-cript and the state did not provide one free in the cir-umstances of their case.

Griffin has been followed in approximately 13 cases in he criminal process area, involving transcripts and other egal instruments,[12] requirements to invoke appellate juris-

[11] "While $4 is, as the State says, an 'extremely nominal' sum, one does not have it and is unable to get it the fee might as ell be $400—which the State emphasizes it is not." *Smith* v. *Ben-ett,* 365 U.S. 708, 712.

[12] *Eskridge* v. *Washington State Bd.,* 357 U.S. 214 (free tran-cript for appeal only if trial judge concludes justice promoted); *raper* v. *State of Washington,* 372 U.S. 487 (free transcript for ppeal only if trial judge makes certain findings); *Long* v. *District ourt,* 385 U.S. 192 (no provision for free transcript for indigent's ppeal from denial of habeas corpus petition); *Roberts* v. *LaVallee,* 89 U.S. 40 (no provision for free transcript for indigent-ac-used of testimony of witnesses at preliminary hearing); *Gardner* . *California,* 393 U.S. 367 (no provision for free transcript of hear-ng denying habeas corpus petition, where a *de novo* hearing on peti-on in appellate court).

diction,[13] counsel for indigent defendants on appeal[14] and the conversion of a fine assessed an indigent defendant to time served.[15] During the 1971 Term, the Court applied the *Griffin* rule in a non-felony case, *Mayer* v. *Chicago*, 404 U.S. 189, noting the "invidiousness" of a rule having an impact along lines of wealth. 404 U.S. at 196-197.[16]

In sum, in the fee and payment cases, this Court held that procedures which had an *impact* along lines of wealth "introduce[d] capricious or irrelevant factor[s]." *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 668.[17]

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[13] *Lane* v. *Brown*, 372 U.S. 477 (filing of transcript, available to indigent only on request of public defender, necessary for appellate jurisdiction to review denial of *coram nobis* petition); *Williams* v. *Oklahoma City*, 395 U.S. 468 (filing of "case made" in appellate court necessary to invoke jurisdiction to review criminal conviction).

[14] *Douglas* v. *California*, 372 U.S. 353; *Swenson* v. *Bosler*, 386 U.S. 258; *Anders* v. *California*, 386 U.S. 738.

[15] *Williams* v. *Illinois*, 399 U.S. 235, *Tate* v. *Short*, 401 U.S. 395. In these two cases, "[a]pplying the teaching of the *Griffin* case," the Court held "that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense." *Williams* v. *Illinois*, 399 U.S. 235, 241.

[16] See also *Lindsey* v. *Normet*, 92 S. Ct. 862; *Townsend* v. *Swank*, 404 U.S. 282. The Court held in *Lindsey* that Oregon's double bond requirement for appealing certain landlord-tenant actions contravened the equal protection clause. The opinion stated, in part: "The discrimination against the poor . . . is particularly obvious." 92 S. Ct. at 877. In *Townsend*, the Court stated: "[A] classification which channels one class of people, poor people, into a particular class of low paying, low status jobs would plainly raise substantial questions under the Equal Protection Clause." 404 U.S. at 292, n. 8. (Dictum.)

[17] The Court's decision in *James* v. *Valtierra*, 402 U.S. 137 is consistent with the wealth-impact cases. The lower court in *Valtierra* held that Article XXXIV of the California Constitution violated the equal protection clause of the Fourteenth Amendment, focusing on the fact that *on its face* Article XXXIV "applie[d] only to 'low income persons'. . . ." 313 F. Supp. at 4. In reversing, this Court viewed plaintiffs' challenge as directed *to the face* of the provision: "[A]ppellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative." 402 U.S. at 141-142.

In contrast, the admitted *impact* of the statutory scheme here is to apportion educational opportunity along lines of wealth. *Valtierra*

The Court used several analyses in deciding these cases. We show in this brief that the textbook fee denies Fourteenth Amendment rights under each approach. We demonstrate also that application of the standard articulated in *Dandridge* v. *Williams,* 397 U.S. 471, 487—"rationally based and free from invidious discrimination"—mandates the same result.

2. *The importance of educational opportunity.*

In the fee and payment cases, this Court has considered carefully the particular interest burdened. See, *e.g., Boddie* v. *Connecticut,* 401 U.S. 371, 374; *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670; *Griffin* v. *Illinois,* 351 U.S. 12, 19. Important interests are at stake here, for books "are the most essential tool of education,"[18] and "[o]ur public educational system is the genius of our democracy." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 628 (dissenting opinion).

In 1954, this Court unanimously stressed the importance of educational opportunity in *Brown* v. *Board of Education,* 347 U.S. 483, 493.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It

suggests that this Court will treat differently facial racial classifications and facial classifications based upon wealth. To construe the case more broadly, however, is to ignore the prior wealth-impact decisions and the subsequent holdings and statements in *Mayer*, *Townsend*, *Lindsey* and *Bullock*.

[18] *Board of Education* v. *Allen*, 392 U.S. 236, 252 (dissenting opinion of Black, J.).

> is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Fourteen years after *Brown I*, this Court expressed similar views on education in *Board of Education* v. *Allen*, 392 U.S. 236, interestingly in construing the same provisions of New York State law involved in this controversy. In *Allen*, the Court upheld the requirement in Section 701 that public school systems provide texts for students enrolled in parochial schools, noting in the opinion: "Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." 392 U.S. at 247.

During the October, 1970 Term, this Court reiterated its view on the importance of education, quoting from *Brown I* in *Palmer* v. *Thompson*, 403 U.S. 217, 221, n.6.[19]

In this case, despite ruling against plaintiffs, the court of appeals majority characterized education as "no doubt

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[19] In *Palmer*, the Court distinguished the closing of swimming pools involved in *Palmer*, and public schools in *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (ED. La., 1960), *affirmed per curiam*, 365 U.S. 569, stating: "Of course that case [*Bush*] did not involve swimming pools but rather public schools an enterprise we have described as 'perhaps the most important function of state and local governments.' *Brown* v. *Board of Education* . . . ." *Palmer*, *supra*, 403 U.S. at 221, n. 6; see also 403 U.S. at 229 (concurring opinion of Blackmun, J.).

an area of fundamental importance" (App. at 72), a conclusion with which Judge Kaufman dissenting agreed. (App. at 77-79.) Other lower federal courts have reached the same conclusion. In a seminal case, the Court of Appeals for the Fifth Circuit held in *Dixon* v. *Alabama*, 294 F. 2d 150 (1961), that due process required notice and hearing prior to the expulsion of a student from a public college. The court's opinion, by Judge Richard Rives, reads, in part, as follows (294 F. 2d at 157):

> It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.[20]

Commentaries have also recognized the unique significance of education.[21]

As the quotations from *Brown I* and *Dixon* reveal, education is precious not only in its own right, but also because it provides the tools necessary for exercising other important rights—voting (*Harper* v. *Virginia State Board of*

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[20] See also *Williams* v. *Dade County School Board*, 441 F. 2d 299, 302 (C.A. 5, 1971) (Per Tuttle, J.); *Hosier* v. *Evans*, 314 F. Supp. 316, 319, 320 (D. Vir. Is., 1971); *Ordway* v. *Hargraves*, 323 F. Supp. 1155, 1158 (D. Mass., 1971); *Sullivan* v. *Houston Independent School District*, 333 F. Supp. 1149, 1171-1172 (S.D. Tex., 1971); *Van Dusartz* v. *Hatfield*, 40 Law Wk. 2228 (Oct. 26, 1971), No. 3-71 Civ. 243 (D. Minn., Oct. 12, 1971); *Rodriguez* v. *San Antonio Independent School District*, 40 Law Wk. 2398 (Jan. 4, 1972), C.A. No. 68-175-SA (W.D. Tex., Dec. 23, 1971); *Serrano* v. *Priest*, 487 P. 2d 1241, 1258 (Cal. Sup. Ct., 1971).

[21] Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305, 382-389 (1969); Kirp, *The Poor, the Schools and Equal Protection*, 38 Harv. Ed. Rev. 635, 642-645 (1968); Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 28, 48 (1969).

Elections, 383 U.S. 663); speech (*Lovell* v. *Griffin*, 303 U.S. 444); association (*NAACP* v. *Alabama*, 357 U.S. 449); and travel (*Shapiro* v. *Thompson*, 394 U.S. 618). As one article notes:

> [E]ducation underlies the whole substance of the political process and is antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and the quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him.[22]

Similarly, the ability to write a book or magazine article, play a part in the production of a motion picture or give a speech are facilitated and enhanced by education.[23] Conversely, an inadequate education is likely to have a lingering, negative impact. "Unequal education ... leads to unequal job opportunities, disparate income,[24] and handi-

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[22] Coons, Clune and Sugarman, *supra* n. 21, at 368.

[23] See, *e.g.*, *A Book, Etc.* v. *Attorney General of Com. of Mass.*, 383 U.S. 413 (book); *Jacobellis* v. *Ohio*, 378 U.S. 184 (motion picture); *Terminiello* v. *Chicago*, 337 U.S. 1 (speech).

[24] A comprehensive Bureau of the Census analysis demonstrates the correctness of the court's observation on "disparate income."

> In every year for which data are presented, additional schooling is associated with a very substantial increase in lifetime income. On the basis of conditions in 1961, a man with less than 8 years of schooling could expect to earn about $151,000 in a lifetime. Graduation from elementary school would add $54,000 to his expected earnings. Similarly, a man with 1 to 3 years of high school could expect to earn $235,000 over a lifetime, compared with a total of $273,000 for the high school graduate. Financial returns prove greatest, as might be expected, at the college level. The man with some college training, but without a degree, could expect to earn about one-third of a million dollars in a lifetime, whereas the total for the college graduate was nearly half a million.

Miller, Herman P., Bureau of the Census, *Income Distribution in the United States*, (U.S. Government Printing Office, 1966), Chapter VI, "Income and Education," at 162-163.

apped ability to participate in the social, cultural, and olitical activity of our society." *San Francisco Unified chool District* v. *Johnson*, 3 Cal. 3d 937, 950 (Cal. Sup. Ct., 971), *cert. denied*, 401 U.S. 1012.

The courts do not stand alone; all of the other institu-ons of government reflect similar concern for education. has, President Nixon has recognized its importance to e individual and society, terming "education ... the y that opens the door to personal progress,"[25] and stat-g: "America's public schools are our principal invest-ent in our own future. In every State the public schools e literally the guarantee of the State's life and growth d health."[26] The President has specifically noted the need r dealing with the educational problems of poor children, ke those denied textbooks here, stating: "The most glaring ortcoming in American education today continues to be e lag in essential learning skills in large numbers of ildren of poor families."[27]

Congress has enacted legislation providing funding for ducational programs.[28] Education is made compulsory

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[25] Statement by the President on Elementary and Secondary School esegregation, March 24, 1970, at 18.

[26] Statement by *President Nixon*, Feb. 16, 1970, at 1. Similarly, an Education Message to Congress on January 29, 1963, *President ennedy* stated:

> Education is the keystone in the arch of freedom and progress. Nothing has contributed more to the enlargement of this Nation's strength and opportunities than our traditional system of free, universal elementary and secondary education, coupled with widespread availability of college education." (1963 U.S. Code Cong. and Adm. News at 1450.)

e also 1968 Code at 4648-4649, Statement of *President Johnson* American Education Week. ("Education—universal, equal and xcellent—is a goal which we have cherished since our country's birth.")

[27] President Nixon, Education Reform Message to Congress, March 1970, in Weekly Compilation of Presidential Documents, March 9, 970, at 304, 308.

[28] See, *e.g.*, Elementary and Secondary Education Act of 1965, 0 U.S.C.; National Defense Education Act of 1958, Title 20 U.S.C.; d Johnson-O'Malley Act, Title 25 U.S.C.

for at least ten years by New York and all but three of the other states.[29] And, in fiscal 1968, 35 percent of New York's state and local tax dollars were spent on public schooling.[30]

B. *The Denial of Books to Poor Children in Grades 1 to 6 Is Not Rationally Based and Constitutes Invidious Discrimination.*

The local defendants' fee requirement for texts operates to create two classes of students in grades 1-6. Children whose parents can afford the fee receive "essential" textbooks. Other children, because of their parents' poverty, are denied texts, and, the local defendants admit, an educational opportunity equal to the children of the more affluent families.[31] As noted by Judge Kaufman in dissent, here there are "two classes of children, not physically separate yet unequal—the poor suffer while the rich receive the full benefits of the state's educational program." (App. at 80.) We submit this classification is not "rationally based and free from invidious discrimination" (*Dandridge* v. *Williams*, 397 U.S. 471, 487),[32] and, therefore, denies the equal protection of the laws.

1. *The classification is not "rationally based."*

At the threshold, the equal protection clause "imposes a

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[29] N.Y. Education Law, Sec. 3205 (1) (a); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: Non-Constitutional Analysis*, 117 U. Pa. L. Rev. 373, 393-4, n. 74 (1969).

[30] Calculated from Advisory Commission on Intergovernmental Relations, State and Local Finances, Tables 8 and 12 (1969).

[31] See pp. 6-8, *supra*.

[32] See also *Lindsey* v. *Normet*, 92 S. Ct. 862, 876. ["Section 105.160, however, imposes additional requirements which in our judgment *bear no reasonable relationship to any valid state objective and which arbitrarily discriminate* against tenants appealing from adverse decisions in FED actions." (Emphasis added.)]

requirement of some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-309. The challenged classification does not satisfy this standard.

In terms of their own conduct, all elementary students, rich and poor, arrive at the schoolhouse door in District 27 similarly situated. The students' conduct is the proper reference point. First, it is their Fourteenth Amendment rights which are at issue.[33] Second, while children must often rely upon their parents, here the state makes school attendance compulsory. See New York Education Law, Section 3205 (1) (a). Given these factors, depriving children because of their parents poverty is an example not of "rationality," but instead an "arbitrary ... choice" by which defendants provide "dissimilar treatment for [students] who are ... similarly situated ...." *Reed* v. *Reed*, 404 U.S. 71, 76-77. Defendants "arbitrarily discriminate ...." *Lindsey* v. *Normet*, 92 S. Ct. 862, 876.

Such arbitrariness formed the basis for the ruling invalidating school fee policies on equal protection grounds in *Chandler* v. *South Bend Community School Corporation*, C.A. No. 71 S 51 (N.D. Ind., Aug. 26, 1971). The opinion states, in part:

> ... Defendant herein has totally failed to present any reason why the Plaintiff-students should incur sanctions for their parents' failure to pay school fees. The school fee collection procedure as applied to these minor-Plaintiffs, conditions *their personal* right to an education upon the vagaries of their parents' conduct,

[33] See *Tinker* v. *Des Moines Ind. Com. Sch. Dist.*, 393 U.S. 503, 511. ("Students in school as well as out of school are 'persons' under our constitution. They are possessed of fundamental rights which the state must respect ....") *Brown I*, 347 U.S. 483, 493. ("We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe it does.")

an intolerable practice.... (Mem. Op. at 6.) (Emphasis in original.)

Defendants' conduct fares no better if the objectives of the fee policy are considered. The apparent purpose of the requirement is to raise funds to secure texts for grades 1-6. Given this goal, the challenged requirement places children in "different classes on the basis of criteria wholly unrelated to the [state's] objective ...." *Reed* v. *Reed*, 404 U.S. 71, 75-76. For where parents are poor, this classification produces no greater revenue.[34]

The classification cannot be justified as "rationally based" on the ground that denying books to poor children decreases the total needed, and, therefore, enables the system to secure a sufficient number of texts with revenue from the fees paid. The fee requirement is but one small thread in the fabric of New York's education law. Denying books to children of the poor is affirmatively destructive of other, and, we submit, overriding state objectives. New York's Constitution requires the legislature to maintain a system of schools "wherein all the children of [the] state may be educated." N.Y. Const., Art. XI, Sec. 1. The state's compusory attendance law requires children between the ages of 6 and 16 to attend school. N.Y. Education Law, Sec. 3205 (1) (a). Manifestly, the deprivation at issue here is directly contrary to the concern for the education of all the state's children which Article XI, Section 1, and Section 3205 (1) (a) evince. "[T]he state spites its own articulated goals ...." *Stanley* v. *Illinois*, 40 U.S. Law Wk. 4371, 4373.

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[34] See *Tate* v. *Short*, 401 U.S. 395, 399. ("Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant can't pay because he is indigent ....")

2. *The denial of books constitutes "invidious discrimination".*

It is equally clear that the classification is invidiously discriminatory. First, the state requires poor children to attend school, where plaintiffs allege, and the lower court concedes, sitting bookless in the classroom while other have the "essential" educational tool, they are likely to be stigmatized, similarly to black students in the dual system. Compare *Brown I*, 347 U.S. at 494, and App. at 62.[35] Further, there can be no claim that the stigmatization serves any remedial purpose. Compare *Wisconsin* v. *Constantineau*, 400 U.S. 433.

Second, the independent, personal rights of children are burdened because of their parents' failure to pay fees. But "it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm [thus done to them] ...." *Levy* v. *Louisiana*, 391 U.S. 68, 72.[36]

Third, we view the stigmatization and arbitrariness as sufficient alone to establish that the state has "impose[d] a regime of invidious discrimination...." *Dandridge* v. *Williams*, 397 U.S. 471, 483. We note, also, however, that

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[35] See also pp. 8-9, *supra; Palmer* v. *Thompson*, 403 U.S. 217, 266-268 (dissenting opinion of White, J.); and Michelman, *supra* n. 21, at 20. ["An 'invidious' classification or trait is one which combines, in greater or lesser degree and in varying proportions, three qualities: (1) a general ill-suitedness to the advancement of any proper governmental objective; (2) a high degree of adaptation to uses which are oppressive in the sense of systematic and unfair devaluations, through majority rule, of the claims of certain persons to non-discriminatory sharing in the benefits and burdens of social existence; (3) *a potency to injure through an effect of stigmatizing certain persons by implying popular or official belief in their inherent inferiority or undeservingness.*" (Footnote omitted; emphasis added.)]

[36] Indeed, it would be arbitrary to deprive parents because of their own poverty. "We have come to recognize that forces not within the control of the poor contribute to their poverty." *Goldberg* v. *Kelly*, 397 U.S. 254, 265.

the wealth-impact classification constitutes "invidious discrimination," (*Douglas* v. *California*, 372 U.S. 353, 356-357; *Gardner* v. *California*, 393 U.S. 367, 370-371); and that there are alternative procedures not involving the destructiveness of the challenged scheme. Consideration of these alternatives is proper. *Carrington* v. *Rash*, 380 U.S. 89, 95-96; *Rinaldi* v. *Yeager*, 384 U.S. 305, 310.[37]

There are at least two available alternatives to the existing procedures in Sections 701 and 703. Apparently without additional expeditures, books could be provided free to children in grades 1 to 12 from indigent families. The remaining revenue from the state appropriation could then be used in a variety of ways to provide books free or at a reduced price to other groups of students (including students whose parents refused to pay although able to do so). In the past, the state has employed a similar procedure.[38] In addition, as plaintiffs pointed out below, state law could include texts for grades 1 to 6 in the category of "or-

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[37] In *Carrington*, like *Dandridge* written by Mr. Justice Stewart, the Court held violative of the equal protection clause a provision of the Texas Constitution prohibiting a person moving to Texas while a member of the armed forces from voting in any election in Texas while remaining in the armed forces. After stating the equal protection standard to be "whether the classifications drawn in a statute are reasonable in light of its purpose" (380 U.S. at 93, quoting *McLaughlin* v. *Florida*, 379 U.S. 184, 191), the opinion noted in detail alternatives available to the state to protect "the integrity of the qualification of residence . . . ." 380 U.S. at 93, 95-96. *Carrington* stresses the importance of voting (380 U.S. at 94, 96), but education—"perhaps the most important function of state and local governments"—is of parallel significance, and this case involves a wealth-impact classification. See pp. 16-24, *supra*.

[38] Section 3209 of the Education Law, repealed by Social Services Law Section 131a (Ch. 517, Laws of 1970), required welfare officials to "furnish indigent children with suitable . . . books, to enable them to attend" school. This provision was in effect as early as 1927. See N.Y. Laws of 1928, Ch. 646, Sec. 627 F. Moreover, the New York law to implement *Gideon* v. *Wainwright*, 372 U.S. 335, requires the appointment of counsel for persons "financially unable to obtain counsel . . . ." N.Y. Code of Criminal Procedure, Sec. 308.

dinary contingent expenses'' for which a local district can levy a tax even in the absence of voter approval. (See N.Y. Education Law, Sec. 2023, and *supra* at page 5, n.3.) The appropriateness of this alternative is clear since New York authorizes its city school districts to provide textbooks free to all grades without direct voter approval. See Education Law, Sections 2503(7), 2554(7).[39] Under each of these alternatives, every student would have books.

Thus, the wealth-impact classification and the availability of alternative procedures buttress our contention that New York "imposes an invidious discrimination in violation of the Fourteenth Amendment." *Carrington* v. *Rash*, 380 U.S. 89, 96.

C. *Defendants' Fee Requirement Contravenes the Fourteenth Amendment as Construed in Griffin v. Illinois*, 351 U.S. 12, *Douglas v. California*, 372 U.S. 353 *And Their Progeny.*

New York requires children to attend school. In District 27, textbooks are essential for meaningful participation in the educational experience. Any child without books faces an overwhelming situation. But it is not likely to be any child, for the fee requirement increases the risk for chil-

[39] The majority below appears to have suggested that under *James* v. *Valtierra*, 402 U.S. 137, the state's right to involve the electorate in the financing process is unlimited. (App. at 70.) However, to justify the inequity by this rationale would be to ignore the distinction between *Valtierra* and this court's wealth-impact cases which we have discussed. (See pp. 16-19, *supra*.) In *Valtierra*, the asserted discrimination was the *facial* requirement of a referendum which was not uniformly applicable. Here, in plaintiffs' poverty claim, the *impact* of the scheme on the poor is challenged, and the issue is whether a vote may validate it. But "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La., 1961), *affirmed per curiam*, 368 U.S. 515. ("No plebiscite can legalize an unjust discrimination." 197 F. Supp. at 659.)

dren of the poor. Common sense dictates that as alleged by plaintiffs, and conceded by the Court below, children without books will be severely stigmatized. In the words of Judge Kaufman dissenting, "their disfavored treatment must extend far beyond the classroom and aggravate to an incalculable degree other disadvantages these indigent students must in our society inevitably struggle against...." (App. at 79.)

The combination of state compulsion and injury to the poor is a familiar one to this Court. In every material respect, the facts here parallel those in this Court's criminal process decisions beginning with *Griffin* v. *Illinois*, 351 U.S. 12.

1. *The Fourteenth Amendment principles established in Griffin-Douglas and their progeny.*

In *Griffin* v. *Illinois*, 351 U.S. 12, this Court held that the state's system of criminal appellate review, challenged by indigent defendants because of its failure to provide for free trial transcripts in the circumstances of their case, violated the Fourteenth Amendment by denying them the "adequate appellate review accorded to all [with] money enough to pay the costs in advance." *Griffin, supra*, 351 U.S. at 18. The state had "concede[d] that ... petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors." *Griffin, supra*, 351 U.S. at 16.

This Court decided *Griffin* on the premise that Illinois was not required by the federal constitution to afford any appellate review. "But that is not to say that a state that does grant appellate review can do so in a manner that discriminates against some convicted defendants on account of their poverty." *Griffin, supra*, 351 U.S. at 18.[40]

[40] It is clear, therefore, that the decision below cannot be supported by any right-privilege rationale. See also *Graham* v. *Richardson*, 403 U.S. 365, 374.

Emphasizing the irrationality of the wealth classification, he Court noted: "[T]he ability to pay costs in advance ears no rational relationship to a defendant's guilt or in-ocense . . . ." *Griffin, supra,* 351 U.S. at 17-18. "There can e no equal justice where the kind of trial a man gets de-ends on the amount of money he has." *Griffin, supra,* 51 U.S. at 19.

Griffin has had a steady growth, as we have noted. Two ases involved fees similar to the defendants' fee. See *Burns . Ohio,* 360 U.S. 252 and *Smith* v. *Bennett,* 365 U.S. 708, iscussed above at page 16. In *Douglas* v. *California,* 72 U.S. 353, indigent criminal defendants challenged n appellate court's failure to appoint counsel to pre-ent their appeal. The court relied upon a rule requir-ng such appointment only if it determined, after examin-ng the record, that counsel would be helpful to the defen-ant or the court. This Court, viewing the procedure as one n which "the rich man can require the court to listen to rgument of counsel before deciding on the merits, but a oor man cannot," held that "an unconstitutional line [had] een drawn between rich and poor." *Douglas, supra,* 372 .S. at 357.[41]

In short, in *Griffin-Douglas* and their progeny, including *Burns* and *Smith,* this Court found access to an important ight under state law, nominally available to all, totally or ubstantially unavailable to poor persons. The Court con-luded that the classification bore "no rational relation-hip" to a permissible state objective; and held that the Fourteenth Amendment required state officials, at least so ong as they followed the most likely course of action (con-nued prosecution), to act affirmatively to insure access or the indigent person. Thus, for example, in the transcript ases, the state must provide a free transcript, or adequate

[41] We have discussed 12 additional cases above. See pp. 17-18, *supra.*

substitute if any. *Griffin, supra,* 351 U.S. at 20; *Gardner* v. *California,* 393 U.S. 367, 370.

2. *The Fourteenth Amendment principles set forth in Griffin-Douglas and their progeny require that poor children be provided free textbooks.*

There is a striking parallel between the pivotal facts in *Griffin-Douglas* and this case. (1) In each instance, the predicament results from state compulsion; in *Griffin-Douglas* by prosecution, and here from the compulsory attendance law. (2) Here, as in *Griffin-Douglas,* something, unavailable to indigents,[42] is an essential tool for enjoyment of the right. (3) Without books, similar to an indigent without a transcript or an attorney, a student from a poor family is denied the benefit of the right "accorded to all [with] money enough to pay the costs in advance." *Griffin* v. *Illinois,* 351 U.S. 12, 18.

The equal protection clause is as clearly violated when the quality of education a child received depends upon the affluence of his parents, as where "the kind of trial a man gets depends on the amount of money he has." *Griffin, supra,* 351 U.S. at 19. Plainly, *a parent's* ability to pay costs in advance bears "no rational relationship to" *a child's* right to an education. *Griffin, supra,* 351 U.S. at 17-18.

There is no basis for construing the Fourteenth Amend-

[42] It is true that the court of appeals suggested that the "fixed allowance" plaintiffs received under New York's Welfare law "was intended to cover this as well as other contingent needs." (App. at 61-62, n. 3.) Of course the suggested intent of the law is irrelevant; whether or not the parents were able to pay the fee is a question of fact. Since this case was decided on a motion to dismiss, plaintiffs' affidavits and allegations of their inability to pay the fees must be taken as true. See, *e.g.*, *Cooper* v. *Pate,* 378 U.S. 546; *Gardner* v. *Toilet Goods Association,* 387 U.S. 167, 172.

ment differently from *Griffin-Douglas,* because this case involves education rather than crime. The text of the Amendment makes no such distinction between criminal and other matters, and this Court has not so construed it.[43] The *Griffin* opinion emphasizes the importance of fairness in the criminal process, but education is of parallel significance, as our argument at pages 19 to 24 demonstrates. Moreover, the *impact* of the challenged conduct is to classify based on wealth, similarly to *Griffin-Douglas* and the other wealth-impact cases outside the criminal process area, which we have discussed.[44]

Indeed, there are sound arguments that plaintiffs' case is stronger than *Griffin-Douglas.* First, education is our hope to make unneeded protection in the criminal process. In an address to the National Conference on Corrections on December 7, 1971, Chief Justice Burger stated:

> Here [prison education programs] perhaps our failure is the greatest. The percentage of inmates in all institutions who cannot read or write is staggering. Another, and largely overlapping category, is made up of those who have no marketable skills on which to base even a minimally successful life.
>
> The figures on literacy alone are enough to make one wish that every sentence imposed could include a provision that would grant release when the prisoner had learned to read and write, to do simple arithmetic, and then to develop some basic skill that is salable in the market place of the outside world to which he must some day return and in which he must compete. (Explanation added.)[45]

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[43] See, *e.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371; *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663; *Brown* v. *Board of Education*, 347 U.S. 483.

[44] See pp. 16-19, *supra.*

[45] See also Coons, Clune and Sugarman, *supra* n. 21, at 362. ["Aside from reducing the crime rate (the inverse relation is strong), education

Second, as we have shown, in this case unlike *Griffin-Douglas,* children are deprived not because of their own actions, but instead because of their families' indigency, for these poor children, an "unalterable [trait] . . . ." *Lindsey* v. *Normet,* 92 S. Ct. 862, 874. And, the scheme will operate to stigmatize poor children, similarly to segregation based upon race in the dual system, with no basis for claiming any remedial benefit from the procedure producing the stigmatization.[46]

Our contentions based upon *Griffin-Douglas* and their progeny are buttressed by this Court's decision in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, and by the Seventh Circuit's school fee case, *Williams* v. *Page,* No. 18536 (C.A. 7, June 9, 1971) (unreported), *cert. denied,* 404 U.S. 1005, *reversing,* 309 F. Supp. 814 (N.D. Ill., 1970). In invalidating on equal protection grounds Virginia's $1.50 poll tax in *Harper,* this Court stated: "[W]ealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper, supra,* 383 U.S. at 670. As we have shown,[47] the importance of education parallels that of voting. We submit that similarly to *Harper,* "wealth or fee paying has . . . no relation to [an education]; the right

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also supports each and every other value of a democratic society . . . ." (footnote omitted.)] *Johnson* v. *Avery,* 393 U.S. 483, 487. ["Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." (Footnotes omitted.)]

[46] See pp. 8-9, *supra.* In his dissenting opinion, Judge Kaufman stated: "The psychological and social impact of the badge of inferiority implied by their disfavored treatment must extend far beyond the classrooms and aggravate to an incalculable degree other disadvantages these indigent students must in our society inevitably struggle against as a result of the financial straits of their parents. The enduring lesson they are thus taught in the public schools they attend without books is that wealth breeds favored treatment while disadvantage leads on to still greater handicaps." (App. at 79.)

[47] See pp. 19-24, *supra.*

to [an education] too precious, too fundamental to be so burdened or conditioned."

In *Williams* v. *Page,* elementary and high school students challenged, on Fourteenth Amendment grounds, the collection of fees as a condition for participation in graduation-related activities in public schools. The complaint alleged that as a consequence of the fee requirement the activities "[were] not available to the plaintiffs on equal terms because they [were] indigent." *Williams* v. *Page, supra,* 309 F. Supp. at 815. The district court dismissed the complaint.

The Seventh Circuit's brief order reversing the dismissal of the complaint reads, in part, as follows:

> The complaint alleges that graduation participation is an essential part of a child's education and the complaint may be construed as claiming that in the schools concerned the activities for which the fees are required have been recognized by the school administrators, teachers, parents and students as integral parts of the school experience, from which indigent children are being excluded. Until these and related factual questions are explored at an evidentiary hearing, the precise contours of the constitutional rights which plaintiffs claim were violated are not readily discernible.

Application of the *Williams* standard would require reversal here. To paraphrase the quoted language, the complaint herein alleges that "fees are required" for textbooks, "an essential part of a child's education," and as a consequence that "indigent children are being excluded."

The record in this case is clear that textbooks are an essential element of the educational process. (App. at 40-41.) Therefore, the defendants must provide them free to poor children. *Griffin* v. *Illinois, supra,* 351 U.S. at 20; *Gardner* v. *California,* 393 U.S. 367, 370. Strictly speaking,

it would appear that in *Griffin-Douglas*, and this case, Fourteenth Amendment obligations could be satisfied by ways other than furnishing free a transcript, counsel or books. Thus, the state could release an indigent defendant[48] and the curriculum could be other than textbook oriented. However, to the extent that furnishing a transcript, counsel or books is the most likely state response, the affirmative action here is precisely analogous to *Griffin-Douglas*.[49]

3. *The Court of Appeals erroneously construed Griffin-Douglas and their progeny.*

Despite the obvious parallels between *Griffin-Douglas*, their progeny, and this case, the lower courts rejected plaintiffs' poverty claim. Indeed, the district court did not even mention the poverty argument. The courts below erred in deciding the Fourteenth Amendment issues.

The Court of Appeals rejected the poverty contentions because "[t]he reasoning of [the] cases [relied upon by

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[48] "The remedy for the discrimination is simple, clear and effective —i.e., give the appellant a transcript (and a lawyer) or else let him go; . . ." Coons, Clune and Sugarman, *supra* n. 21, at 362.

[49] This Court has approved affirmative remedial action to provide equal educational opportunity. The *Brown I* opinion stated that the opportunity of an education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown I*, 347 U.S. 483, 493. Thereafter, in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U.S. 218, 233, this Court held that the district court had the authority to direct public officials to exercise their power to raise funds adequate to operate a racially nondiscriminatory school system. And, finally, in the 1970 Term, the Court upheld unanimously the order of a district court which required state officials to provide substantial, additional student transportation. *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1. See also *United States* v. *School District 151 of Cook County, Ill.*, 301 F. Supp. 201, 232 (N.D. Ill., 1969), *affirmed as modified*, 432 F. 2d 1147 (C.A. 7, 1970), *cert. denied*, 402 U.S. 943; *Hosier* v. *Evans*, 314 F. Supp. 316, 320 (D. Vir. Is., 1970).

plaintiffs] [50] is that the State is required to provide these services and access because to do otherwise would be to deprive indigents of due process. Obviously, though, due process is not involved here." (App. at 72.) The court also argued that "such money as the School Board has to spend is being spent in such a way as to benefit all students (*i.e.*, on teachers' salaries, building maintenance and the like.) (Footnote omitted.)" (App. at 73.) Finally, while acknowledging that students whose families could afford texts would no doubt receive a better education, the court said that this was due to their own means, and not because the state provided them more. (App. at 73.)

Any surface plausibility of this reasoning does not withstand scrutiny. First, as noted by Judge Kaufman in dissent, *Griffin* "rested by its own language squarely on the equal protection guarantee, as well as on due process . . . ." (App. at 80.) See *Griffin, supra*, 351 U.S. at 13, 18.[51]

Second, it could have been argued in *Griffin-Douglas*, where appellate review was nominally available to the indigent, as the lower court did here, that "such money as the [State had] to spend [was] being spent in such a way as to benefit all [defendants]," that is, on salaries for judges and clerks, building maintenance, etc., and that to the extent that the affluent defendant had a more adequate appeal, this was a result of a private supplement. In fact, similar contentions were urged *in dissent* by Justice Harlan in both *Griffin* and *Douglas*.[52] A majority of this Court held, however, that in certain contexts the Fourteenth

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[50] The court cited: *Boddie* v. *Connecticut*, 401 U.S. 371; *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708; *Gideon* v. *Wainwright*, 372 U.S. 335.

[51] See also *Griffin, supra*, 351 U.S. at 34 (dissenting opinion of Harlan, J.); and *Williams* v. *Illinois*, 399 U.S. 235, 241, explaining *Griffin* as finding "a violation of the Equal Protection Clause . . . ."

[52] *Griffin, supra*, 351 U.S. at 34; *Douglas* v. *California*, 372 U.S. 353, 361-362.

Amendment requires more than simply facial neutrality (*Griffin, supra*, 351 U.S. at 17, n. 11):[53]

> Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation.

For the reasons we have given, the same principle should apply here.

D. *The Denial of Books to Poor Children in Grades 1-6 Violates the Equal Protection Clause, Even If the Asserted Bases for Distinguishing Grades 1-6 and 7-12 Are Considered.*

Plaintiffs' poverty claim focuses on the division of students in grades 1 to 6 into two groups; *i.e.*, those who receive books, and the poor who do not receive the "essential" tool and are stigmatized.[54] Since the poverty claim concerns only grades 1-6, the justifications advanced in the courts below for the differing treatment of grades 1-6 and 7-12 in the statutory scheme are not material.[55] We submit, however, that even if the asserted bases for distinguishing grades 1-6 and 7-12 are considered, the stat-

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[53] See also *Williams* v. *Illinois*, 399 U.S. 235, 242.

[54] See pp. 6-8, 24, *supra*.

[55] The district court, although without the benefit of an evidentiary hearing, identified three state interests: (1) the legislature's "legitimate interest in conserving the State's fiscal resources . . . ." (App. at 54); (2) insuring "that as many as possible of [New York's] children receive textbooks"; (App. at 56); and (3) "[t]he legislature's desire to foster the study of certain subjects [the sciences, mathematics and foreign languages] . . . ." (App. at 57.) In approving the district court's analysis (App. at 67), the majority below referred to the legislative desire "to promote education in the fields of science, mathematics and foreign languages," and "limited resources." (App. at 67, 69.)

utory scheme denies poor children the equal protection of the laws.[56]

We view this result as mandated by this Court's decisions, for essentially four, interrelated reasons. First, there are less onerous alternatives for satisfying the purported state interests. See, *e.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371, 381-382; *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 212-213. Second, the classifications are not sufficiently tailored to achieving the purported state interests to justify the virtual exclusion of poor children from all educational opportunity. See, *e.g.*, *Kramer* v. *Union Free School District*, 395 U.S. 621, 633; *Bullock* v. *Carter*, 92 S. Ct. 849, 857; *Dunn* v. *Blumstein*, 40 U.S. Law Wk. 4269, 4276, 4279. Third, inadequate weight is given to "the interests of those who are disadvantaged by the classification" (*Kramer, supra*, 395 U.S. at 626, quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30), namely, indigent students without books. Fourth, the approved scheme is one under which the state impermissibly protects "the fiscal integrity of its programs" through "invidious distinctions between classes of citizens." *Graham* v. *Richardson*, 403 U.S. 365, 374-375.

These principles are here applicable. The destructive impact of the scheme on the education of poor children is admitted. The significance of education — "perhaps the most important function of state and local governments" — is analogous to the interests involved in the cited cases, and others upon which we rely;[57] and, like many of those

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[56] The first two claims in the complaint, which petitioners do not press in this Court, did deal with the differing treatment of grades 1-6 and 7-12. The first claim concerned the requirement that free books be provided only for grades 7-12, and the second that the procedural requirement of voter approval applied only to grades 1-6. (App. at 10-11.)

[57] For example, in *Boddie* v. *Connecticut*, 401 U.S. 371, 374, the Court noted "the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship . . . ." As Judge Kaufman stated in dissent below: "Only 'through the looking glass'

cases, this matter involves conduct the *impact* of which is to classify based upon wealth.

1. *The availability of less onerous alternatives.*

This Court has considered material, in assessing a wide variety of constitutional claims, the availability of "less drastic" alternatives for satisfying state objectives. *Dunn* v. *Blumstein*, 40 U.S. Law Wk. 4269, 4276.[58] Here, as we have shown,[59] there are at least two available alternatives for satisfying the purported state interests. First, aid could initially be directed to indigent students in grades 1-12; second, the existing category of services for which districts may levy a tax in the absence of voter approval could be expanded to include texts for grades 1-6. New York is familiar with each method.[60]

Under each of these alternatives, costs to the state would apparently not be higher, and all students in grades 1 to 12, including those from indigent families, would have texts, the maximum possible impact. Accordingly, each alternative would also foster development "in the fields of science, mathematics, foreign languages and other non-sectarian subjects." N.Y. Laws of 1965, Ch. 320, Sec. 1. Thus, all three of the purported state interests would be satisfied. Indeed, as we show below, these alternatives would in certain respects be superior methods of satisfying the asserted state interests.

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might one rank a child's interest in education lower on the scale of this nation's traditional values than an adult's interest in a divorce." (App. at 80.)

[58] See also *Boddie* v. *Connecticut*, 401 U.S. 371, 381-382; *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 212-213; *Carrington* v. *Rash*, 380 U.S. 89, 95-96; *Tate* v. *Short*, 401 U.S. 395, 399-400; *Bullock* v. *Carter*, 92 S. Ct. 849, 857; *Shapiro* v. *Thompson*, 394 U.S. 618, 637; *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354.

[59] See pp. 28-29, *supra*.

[60] See pp. 28 at n. 38, 29, *supra*.

The district court began its analysis correctly, considering the availability of a less onerous alternative. Expressing the *opinion* that texts for grades 7 to 12 are more costly than those for grades 1-6, Judge Travia stated that the alternative of "grant[s] . . . spread thinly" among all students (grades 1 to 12) could, in view of the cost factor, result in a larger number of students being without books. (App. at 56.) The court concluded that "New York State has a legitimate, compelling interest in seeing to it that as many as possible of its children receive textbooks." (App. at 56.)

The court erred, however, in giving full consideration to only one alternative, *i.e.*, "grant[s] . . . spread thinly" (App. at 56), for the search for alternatives must be an exhaustive one. *Carrington* v. *Rash*, 380 U.S. 89, 95-96; *Tate* v. *Short*, 401 U.S. 395, 399-400. Here, New York law demonstrates the feasibility of two alternatives not considered by the district court. Moreover, if the legislature's concern was that "as many as possible of [New York's] children receive textbooks," the alternatives would be superior, for every child, including poor children, would have books.

2. *The statutory scheme is not adequately tailored to achieving the asserted state objectives to justify the challenged impact on children of the poor.*

Cursory analysis demonstrates that if the legislature intended to advance the interests mentioned by the lower courts, the statutory scheme "is extraordinarily ill-fitted to that goal; . . ." *Bullock* v. *Carter*, 92 S. Ct. 849, 857. Providing free texts to a millionaire's children and the many other children in grades 7-12 whose parents can afford texts, while denying them to the poor, does not

maximize the impact of state aid. Nor does it conserve limited resources. Similarly, the state cannot complain about limited resources when it provides assistance in grades 7-12 not only to public schools, but also to "private school[s] which [comply] with the compulsory education law . . . ." N.Y. Education Law, Sec. 701(2).[61]

We note also that the "statement of policy" prefacing the 1965 amendments to Sections 701 and 703, from which the lower courts identified a state interest to promote development in certain subjects, reads as follows:

> This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages *and other nonsectarian subjects.* (Emphasis added.)

The courts below read this provision as if it mentioned only the three named subjects, ignoring the phrase "and other non-sectarian subjects." They then viewed the legislative scheme as giving aid where the three "subjects principally were taught." (App. at 69.) This rationale is faulty, for it is clear from the full provision that the legislature's goals apply equally to grades 1 to 6. (1) The phrase "other non-sectarian subjects" covers every subject in the public schools.[62] (2) Science and mathematics are

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[61] Many "private school[s]" in New York, whose students are eligible to receive free books, have high tuition charges. See *The Handbook of Private Schools*, 52nd Edition, (Porter Sargent, 1971), at 254, 256-257, 269-270, 274, 278, 280 and 281.

[62] See *Board of Education* v. *Allen*, 392 U.S. 236, 248. ["Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, *history or literature*, are used by the parochial schools to teach religion." (Emphasis added.)]

taught in the elementary grades in New York State.[63] (3) Schooling in the elementary years is a necessary foundation for success in classes in the secondary grades. Poor children without books in the elementary grades will not be compensated by having them in grades 7 to 12.

In *Kramer* v. *Union Free Shool District*, 395 U.S. 621, this Court held that provisions of New York law excluding certain persons from voting for school district officers were "not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs [the asserted state interest] to justify the denial of the franchise . . . ." 395 U.S. at 633. (Explanation added.) Here, the interest of poor children is in an education — "perhaps the most important function of state and local governments." Given the scatter-shot approach to achieving the purported state interests,[64] in this case similarly to *Kramer*, the legisla-

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[63] In addition, New York State has a program of Foreign Languages in the Elementary School (FLES) which enrolled the designated number of students in the years indicated: 1963—45,000; 1968—83,000; and 1969-70 school year—60,000. The State Education Department has published a series of program and teaching guides which discuss the rationale and suggested content of FLES programs. N.Y. State Education Dept., *French for Elementary Schools*, Albany, 1966, at iii; N.Y. State Education Dept., *Spanish for Elementary Schools*, Albany, 1970, at 3; N.Y. State Education Dept., Center on Information in Education, Basic Educational Data System Statistics for 1969-70.

The guide for Spanish notes, *inter alia*, that "[i]t is generally agreed that children should begin the study of a foreign language at an early age" and that there "is clear and convincing [evidence] that the introduction of foreign language study at the elementary school level . . . contributes greatly to the child's later success in foreign language study." *Spanish Guide*, *supra*, at 1-2. While "the major focus in the FLES program is directed toward the development of conversational skills, the development of reading skills is not neglected." *Spanish Guide*, *supra*, at 38. The guide refers specifically to "FLES texts." *Id.* at 19-21. To the extent that FLES classes do not rely as heavily on texts as other elementary subjects (*e.g.*, reading), they are similar to certain subjects at the secondary level which use texts little, if at all (*e.g.*, shop).

[64] We need not search far for the reasons for this irrationality. The statute refers to books for "other *non-sectarian* subjects . . ." (N.Y.

tion is "not sufficiently tailored . . . to justify the denial of [an 'essential' educational tool]." In sum, the classification is "much too crude." *Dunn* v. *Blumstein*, 40 U.S. Law Wk. 4269, 4279. See also *Rinaldi* v. *Yeager*, 384 U.S. 305, 310.

3. *The special interests of the children disadvantaged by the classification.*

The governing standards require consideration of the "interests of those who are disadvantaged by the classification." *Kramer* v. *Union Free School District*, 395 U.S. 621, 626, quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30; *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 209-212; *Evans* v. *Cornman*, 398 U.S. 419. The question is "whether all those excluded [poor children in grades 1-6] are in fact substantially less interested or affected than those the statute includes [grades 7-12]." *Kramer, supra*, 395 U.S. at 632 (explanation added); *Kolodziejski, supra*, 399 U.S. at 209.

We have quoted the preliminary language of the 1965 amendments to Sections 701 and 703 and shown that the legislature's objectives apply as well to grades 1 to 6 as grades 7 to 12.[65] At a minimum, students in grades 1-6 are not "substantially less interested."

Laws of 1965, Ch. 320, Sec. 1; emphasis added.) And the majority below stated: "The enactment of Sec. 701 provided public funds for textbooks of children in private and parochial schools for the first time in the modern history of New York State. The passage of Sec. 701 resulted in large part from pressure from those whose children attended those schools . . . ." (App. at 70, n. 6.) The wording of the law and the opinion below demonstrate that a dominant concern of the legislature was the desire to create a constitutional underpinning for the providing of books to parochial school students. Accordingly, in assessing plaintiffs' claim, this Court should be mindful not only of the insufficient tailoring, but also that it cannot be confident "that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams* v. *Illinois*, 399 U.S. 235, 260 (concurring opinion of Harlan, J.).

[65] See pp. 42-43, *supra*.

Moreover, scrutiny of the interests of poor elementary students demonstrates that in this case there is a sound basis for arguing that the "interests of those who are disadvantaged" by the challenged classification are more compelling than those who have texts. We take this position on the basis of legislation and literature which recognize both the critical importance of early childhood education and the need for special attention to the educational problems of the poor.[66]

First, in 1965, Congress enacted the Elementary and Secondary Education Act, Pub. Law 89-10. Title I of the law (20 U.S.C. 241a-241m) is a comprehensive program for providing federal financial assistance to local school systems with concentrations of children from low income families. The congressional declaration of policy in Section 241a begins by recognizing "the special educational needs of children of low-income families." School systems are required by the law, implementing regulations and other statements of governing criteria promulgated by the Office of Education to concentrate Title I programs in those attendance areas with "high concentrations of children from low income families . . . ." 20 U.S.C. 241 e (a)(1); 45 C.F.R. Part 116, Sec. 116.17(d); United States Office of Education, ESEA Program Guide 44, March 18, 1968, Sec. 1.1.[67]

Second, in April, 1970, Congress amended Title I in Public Law 91-230. Section 132(a) recognizes the importance of projects at the elementary level, requiring, with

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[66] It is proper for the Court to consider these materials. *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 208 at n. 4, 210 at n. 6, 211 at n. 8; *Robinson* v. *California*, 370 U.S. 660, 667, n. 9; *Brown* v. *Board of Education*, 347 U.S. 483, 494, n. 11.

[67] "Educationally deprived children," the eligible beneficiaries for Title I programs, include "children who are handicapped or whose needs for . . . special educational assistance result from *poverty*, neglect, delinquency, or cultural or linguistic isolation from the community at large." 45 C.F.R. Part 116, Sec. 116.1 (i) (Emphasis supplied).

certain exceptions, that Title I funds be used "in pre-school programs and in elementary schools serving areas with the highest concentrations of children from low-income families . . . ."[68]

Third, available expert evidence supports the conclusion of the Congress.[69] It presents the following pertinent propositions: (1) a challenge to earlier notions of genetically determined and fixed intelligence — Hunt (1969, at 191-2); Bloom (1964, at 87-90); Bloom, Davis and Hess (1967, at 12); (2) a suggestion that there is considerable plasticity in intelligence in the pre-school and early elementary years — Bloom (1964, at 87-90; 126-9); (3) and, accordingly, a suggestion that early education is critical — Bloom (1965, at 127-8); Bloom, Hess and Davis (1967, at 12, 16, 22); Hunt (1969, preface at VIII). It is noteworthy that both Hunt (1969, at 209) and Bloom, Hess and Davis (1967, at 30) refer to the absence of books in the home as one of the underlying causes of the educational deficiencies frequently exhibited by poor children.[70]

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[68] The Report of the Senate Committee on Labor and Public Welfare (Senate Report 91-634, 91st Congress, 2d Session) provides the following rationale for the amendment (at 20): "This requirement in part C was adopted by the Committee on the basis of growing evidence which indicates that the early years of education are of paramount importance in a child's development." The Report also states that Title I has focused federal monies on "what may well be the most crucial problem challenging our school systems today: how to educate successfully the children of America's poor." (at 7.)

[69] See Benjamin S. Bloom, Allison Davis and Robert Hess, *Compensatory Education for Cultural Deprivation* (Holt, Rinehart and Winston, Inc., 1967) [cited: (Bloom, Davis, Hess, 1967)]; Benjamin S. Bloom, *Stability and Change in Human Characteristics* (John Wiley and Sons, Inc. 1964) [cited: Bloom (1964)]; J. McVicker Hunt, *The Challenge of Incompetence and Poverty, Papers on the Role of Early Education* (University of Illinois Press, 1969) [cited: Hunt 1969)].

[70] The expert evidence also supports plaintiffs' contention that the book distribution procedure will adversely affect poor children "psychologically [and] emotionally . . . ." (App. at 13.) Many children from culturally deprived families begin school not having had adequate

In sum, while poor children "have interests somewhat different from the interests of [students who have books]" (*Phoenix* v. *Kolodziejski*, 399 U.S. 204, 212), all things considered, they "have a stake equal to that of other [pupils]." *Evans* v. *Cornman*, 398 U.S. 419, 426. Defendants "have not demonstrated a valid basis for distinguishing between . . . two legitimate costs of the [educational] process." *Bullock* v. *Carter*, 92 S. Ct. 849, 858.

4. *The limited resources arguments.*

Each of the lower courts viewed the statutory scheme as a legitimate effort to protect limited state resources. In relying in part on this ground in upholding the legislation, the courts below erred; for a desire to conserve resources can not insulate from constitutional attack legislative classification with the flaws which we have demonstrated in this scheme.[71] *Shapiro* v. *Thompson*, 394 U.S. 618, 633; *Graham* v. *Richardson*, 403 U.S. 365, 374-375; *Mayer* v. *Chicago*, 404 U.S. 189, 197.

In *Shapiro*, followed in *Graham* and *Mayer*, this Court stated (394 U.S. at 633):

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education, or any other program. But a State may not accomplish such a

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opportunities for "stimulation, language development, and intellectual development . . . ." (Bloom, Davis, Hess, 1967, at 15.) Their experience does not prepare them well for coping with the requirements of public schools. (At 21.) This frequently means that "[a]s each year of school goes by, the culturally disadvantaged child suffers further frustration and failure." (At 21.) The situation involved in this case would aggravate the problem.

[71] See, *e.g.*, pp. 24-29, 38-47, *supra*.

> purpose by invidious distinctions between classes of citizens. *It could not for example reduce expenditures for education by barring indigent children from its schools.* Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. *The saving of welfare costs cannot justify an otherwise individious classification.* (Emphasis added; footnote omitted.)

Here, the saving of costs for education cannot "justify an otherwise invidious classification." The Court's dictum on education almost precisely covers this situation. While children are not barred from school, they are, on this record, "barred" from an essential tool of an education.[72]

The trial court's fiscal resources analysis, approved by the court of appeals, is erroneous in two other respects. First, the district judge assumed incorrectly that alternatives fully satisfying state objectives would be more costly than the challenged scheme.[73] Second, the district court rejected consideration of any alternative involving increased expenditures. (App. at 55.) While it would not appear necessary to reach the point here, we note that states have adopted new procedures involving expenditures of funds in response to many decisions of this Court. *Griffin-Douglas* and their progeny and the landmark decision in *Gideon* v. *Wainwright*, 372 U.S. 335, holding that counsel must be furnished to indigent criminal defendants

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[72] Any reliance by the local defendants on the collection of fees to defray costs would not support a different conclusion. "We are thus left to evaluate the states' asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin* v. *Illinois*, 351 U.S. 12 (1956)." *Boddie* v. *Connecticut*, 401 U.S. 371, 382.

[73] See App. at 54-55 and pp. 28-29, *supra*.

in state proceedings — are obvious examples. See also *Bullock* v. *Carter,* 92 S. Ct. 849, 858-859. Constitutional rights would be hollow, if states could avoid implementation simply by pleading that expenditures were required.[74]

E. *The Denial of Books to Poor Children in Grades 1-6 Is Not Rationally Based and Constitutes Invidious Discrimination, Even If the Asserted Bases for Distinguishing Grades 1-6 and 7-12 Are Considered.*

The denial of books to children of the poor is not "rationally based and free from invidious discrimination" (*Dandridge* v. *Williams,* 397 U.S. 471, 487), even if the asserted bases for distinguishing grades 1 to 6 and 7 to 12 are considered. First, we have detailed above the invidious discrimination.[75] In summary: (1) a child's personal right to an education is significantly burdened due to his parents' poverty over which he has no control; (2) the child is likely to be stigmatized; (3) the *impact* of the practice is along lines of wealth; (4) and, there are alternatives which would both avoid these injuries and advance the state interests (in a superior fashion).

Second, the statutory scheme is so "extraordinarily ill-fitted" (*Bullock* v. *Carter,* 92 S. Ct. 849, 857) to the state's asserted objectives as to be irrational. Providing books to those who can afford them, but denying them to the children of the poor, neither conserves limited resources, nor maximizes the impact of the state aid. We note again the anomaly of the state's "conserving resources" by providing books for private schools, including those attended by wealthy children.[76]

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[74] See also n. 49 at p. 36, *supra.*

[75] See pp. 27-29, *supra.*

[76] See p. 42, *supra.* The denial of books to poor children does not provide funds to secure texts since their parents are too poor to pay the fee. See p. 26, *supra.*

Contrary to the suggestion of the lower courts, the state's objective was to promote all "non-sectarian subjects," not only science, mathematics and foreign languages. As we have shown, given this objective, it is irrational to deny books to poor children in grades 1-6. Moreover, the poor without books in grades 1-6 will be unable to benefit by having them in grades 7-12.[77] Finally, Article XI, Section 1 of New York's Constitution and the state's compulsory attendance law [Education Law, Sec. 3205(1)(a)] manifest a policy of educating all of the state's children. Their consideration emphasizes the irrationality of denying books to the poor.[78]

III. The Denial of Books to Children from Poor Families in Grades 1-6 Contravenes the Due Process Clause of the Fourteenth Amendment.

The lower court's conclusion that this case presents no due process issue[79] conflicts with decisions of this Court recognizing that the due process clause does protect against arbitrary government infringement of important individual interests, including education. *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Bolling* v. *Sharpe*, 347 U.S. 497; see also *Williams* v. *Illinois*, 399 U.S. 235, 259-266 (concurring opinion of Harlan, J.). Moreover, despite its view on due process, the majority below expressed agreement with plaintiffs' allegation that poor children would be stigmatized by the operation of the statutory scheme. See *Wisconsin* v. *Constantineau*, 400 U.S. 433.

In *Meyer*, this Court reversed the conviction of a teacher under a Nebraska law which forbade the giving of instruc-

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[77] See pp. 42-43, *supra*.

[78] See p. 26, *supra*.

[79] (App. at 72.) ("Obviously, though, due process is not involved here.")

tion in a language other than English to a student below the ninth grade. The Court stressed the importance of education and noted Nebraska's compulsory attendance law. *Meyer, supra,* 262 U.S. at 400. The ruling rested, in part, on the premise that the law arbitrarily burdened "the opportunities of pupils to acquire knowledge" in violation of the due process clause. 262 U.S. at 401-403.[80]

Mr. Justice Harlan premised his concurrence in *Williams* v. *Illinois,* 399 U.S. 235, 259-266, on the due process clause, terming the issue whether the challenged legislation "arbitrarily infringes a constitutionally protected interest . . . ." 399 U.S. at 259.[81] Applying a standard expressed in his opinion,[82] he concluded that the Illinois procedure was violative of the due process clause.

This case involves a due process violation, given these controlling principles:

First, an important individual interest[83] is significantly burdened. In *Meyer* "the opportunites of pupils to acquire knowledge" were infringed by a rule forbidding the teach-

[80] In *Bolling* v. *Sharpe,* 347 U.S. 497, this Court held that operation of a dual school system in the District of Columbia violated the due process clause of the Fifth Amendment. The Court concluded: "Segregation in public education is not reasonably related to any proper governmental objective, thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." 347 U.S. at 500.

[81] The majority held violative of the equal protection clause the Illinois procedure allowing imprisonment of an indigent criminal defendant, in default of payment of a fine, beyond the maximum authorized by the statute regulating the substantive offense. *Williams, supra,* 399 U.S. at 244.

[82] ". . . the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams, supra,* 399 U.S. at 260 (concurring opinion).

[83] See pp. 19-24, *supra.*

ing of foreign languages. Here, the burdening of the same interest results from the failure of the state to provide indigents an admittedly essential educational tool. The deprivation is more extreme in this case, extending to all elements of the curriculum in which books are used.

Second, with respect to "the rationality of the connection between legislative means and purpose" (*Williams* v. *Illinois*, *supra*, 399 U.S. at 260 (concurring opinion)], we have shown that the statutory scheme is irrational.[84]

Third, we submit that the state interests do not outweigh the impact of the challenged scheme on the critical interests of the children [*Williams* v. *Illinois*, *supra*, 399 U.S. at 262-263 (concurring opinion)],[85] particularly in view of the apparent "existence of alternative means for effectuating the [state's] purpose[s] . . . ." *Williams*, *supra*, 399 U.S. at 260 (concurring opinion).[86]

Fourth, a student's interest in an education is a personal one. *Meyer*, *supra*, 262 U.S. at 401; accordingly, it is patently arbitrary for that interest to be burdened due to a circumstance over which the child has no control, the indigency of his family. *Levy* v. *Louisiana*, 391 U.S. 68, 72. See also *Robinson* v. *California*, 370 U.S. 660, 667 and n. 9; *Boddie* v. *Connecticut*, 401 U.S. 371, 383.

Fifth, as we have noted,[87] in view of the statutory reference to "other non-sectarian subjects," it appears that the legislature's reference to science, mathematics and foreign languages, relied upon so heavily by the lower courts, was designed to provide a constitutional underpin-

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[84] See pp. 24-26, 49-50, *supra*.

[85] One commentary notes about *Meyer*: "The individual's interest in education is personal and important, important enough to subdue the arguably rational purpose of the state to democratize its children and thus to avoid the divisions of sect and creed." Coons, Clune and Sugarman, *supra* n. 21, at 376.

[86] See discussion of alternatives, pp. 28-29, *supra*.

[87] See pp. 43-44 and n. 64, *supra*.

ning for providing books to parochial schools. Thus, with respect to the purported justifications here, the Court can not be "confiden[t] . . . that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams, supra,* 399 U.S. at 260 (concurring opinion).

Sixth, our due process contention is buttressed by the acknowledged stigmatization. *Wisconsin* v. *Constantineau,* 400 U.S. 433. As Judge Kaufman stated in dissent below (App. at 79):

> The psychological and social impact of the badge of inferiority implied by their disfavored treatment must extend far beyond the classrooms . . . . The enduring lesson they are thus taught in the public schools they attend without books is that wealth breeds favored treatment while disadvantage leads on to still greater handicaps.

This stigmatization is much more than simply the reflection of private inequality; it is directly attributable to the operation and interaction of the state's education laws in the schools which poor children are required by state law to attend. And unlike *Constantineau,* there is not even a claim of any attempted remedial benefit to those stigmatized.

Conclusion

Plaintiffs sought only declaratory relief on their poverty claim, and did not contest, in the petition, the lower courts' findings of insubstantiality on Claims I and II. Accordingly, this case is not one required to be heard by a three-judge court, and this court has considerable authority in fashioning a remedial decree.[88] This brief shows that plain-

[88] See pp. 13-15, *supra.* Alternatively, this Court might regard the poverty claim as so clearly meritorious that a three-judge court is not required. See *Bailey* v. *Patterson,* 369 U.S. 31.

tiffs' complaint was erroneously dismissed, given the controlling principles set forth in *Conley* v. *Gibson*, 355 U.S. 41, 45-46.

This Court should do more than simply reinstate the complaint, however. In *Boddie* v. *Connecticut*, 401 U.S. 371, the three-judge court also dismissed the complaint without an evidentiary hearing. This Court found the record adequate to hold that the fee requirement for commencing divorce litigation, as applied to poor persons, contravened the due process clause.

The disposition here should be similar to *Boddie*. The Court may regard as established at least the following: New York requires students between the ages of 6 and 16 to attend school; textbooks are "essential" for meaningful participation in the educational process; the fee requirement operates to apportion educational opportunity along lines of wealth; poor children have a special interest in texts; poor children sitting bookless in the classroom will be stigmatized; less drastic alternatives are available; educational opportunity is of great importance. In addition, plaintiffs made affidavits that they received public assistance and were unable to pay the fee; the local defendants generally denied the claim of inability to pay.

We submit that this Court should:

(1) declare that the denial of textbooks to children because of their parents' inability to pay the rental fee contravenes the equal protection clause of the Fourteenth Amendment;

(2) declare that poor children have a right to free textbooks;[89]

(3) remand the case to the district court for identi-

[89] Since the child's right is at issue, it would be appropriate to include any child whose parents' failed to pay the fee by reason of poverty, neglect, etc. See pp. 24-26, 28, *supra*.

fication, on an expedited basis, of the members of the class entitled to receive free texts.[90]

Alternatively, in the event the Court regards plaintiffs' poverty claim as one which must be heard by a three-judge court pursuant to 28 U.S.C. 2281, the decisions below should be vacated and the case remanded for the convening of a three-judge court. As shown in this brief, the poverty claim is "not plainly insubstantial." *Schneider* v. *Rusk*, 372 U.S. 224, 225.[91]

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The United Ministries in
Public Education

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[90] This Court has expressed, albeit in another context, the need for promptly remedying denials of equal educational opportunity. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19. This case was filed at the start of the 1970-71 school year.

[91] Judge Kaufman stated, in part: "I dissent and would hold that plaintiffs have established at the very least a substantial claim that *as applied in* . . . District No. 27 . . . New York Education Law Sec. 703 deprives indigent children of the equal protection of the laws." (App. at 74; emphasis added; footnote omitted.) "[T]he essence of the claim is unequal educational opportunity based on wealth. The state has not justified the inequity sufficiently to warrant the refusal to convene a three-judge court." (App. at 81.)